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IN THE

Supreme Court of the United States

October Term, 1966

No. 66

KALMAN J. BERENYI,

Petitioner,

v.

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 352 F. 2d 71, and is reproduced in the record at R. 303-308. The opinion of the District Court, which contained its findings of fact and conclusions of law, is reported at 239 F. Supp. 725, and is reproduced in the record at R. 271-277.

Jurisdiction

The judgment of the Court of Appeals was entered on November 1, 1965 (R. 308) and the petition for certiorari was filed on January 28, 1966. The petition was granted on April 18, 1966 (R. 309). The jurisdiction of the Court rests on 28 U.S. Code, section 1254(1).

Statutes Involved

(1) Section 101(f)(6) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1101(f)(6), provides in part:

> "(f) For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
>
> (6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;"

(2) Section 241(a)(6)(c) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1251(a)(6)(c), provides in part:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> (c) Aliens who are members of or affiliated with (i) the Communist Part of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; . . ."

(3) Section 313(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1424(a)(2), provides in part:

> "(a) Notwithstanding the provisions of section 405 (b) of this act, no person shall hereafter be naturalized as a citizen of the United States—

(2) who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party or any State of the United States, of any foreign state, or any political or geographical subdivision of any foreign state; . . .".

(4) Section 316(a) of the Immigration and Nationality Act of 1952, 8 U.S. Code, section 1427(a), provides in part:

"(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing of his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years, and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided in the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

(4) Rule 52(a) of the Federal Rules of Civil Procedure provides:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall

find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Questions Presented

I. Whether the Court of Appeals erred in upholding the District Court's findings of fact that the petitioner was a member of the Communist Party of Hungary and that he therefore testified falsely in denying same, and was thus not a person of good moral character within the meaning of the Immigration and Nationality Act of 1952.

A. Whether in the context of the entire record, the evidence adduced against the petitioner constituted substantial evidence upon which a finding of Communist Party membership would not be clearly erroneous.

II. Whether in light of this Court's decisions in *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, *Rowoldt* v.

Perfitto, 355 U.S. 115 and *Scales* v. *United States*, 367 U.S. 203, 222, it was error for the Court of Appeals to uphold a finding of Communist Party membership in a naturalization proceeding without any evidence that such membership consisted of a "meaningful association."

Statement of the Case

A. Administrative Proceedings

On January 30, 1962, the petitioner filed a petition for naturalization (R. 272). After an extended preliminary hearing conducted pursuant to Title 8 U.S.C. Section 1446, a designated naturalization Examiner recommended to the District Court that the petition be denied on the grounds that the petitioner's membership in the Communist party of Hungary and his advocacy of the doctrines of Communism have rendered him ineligible for naturalization under Title 8 U.S.C. Section 1424, and that during the period for which the petitioner is required to establish good moral character, he testified falsely for the purpose of facilitating his naturalization thereby obtaining a benefit under the Immigration and Nationality Act and thus became ineligible for naturalization by virtue of the provisions of Title 8 U.S.C. Sections 1101 and 1427 (R. 272, 273).

B. Proceedings in the District Court

The final hearing on the petitioner's application for naturalization was a joint proceeding involving the petitioner's application together with the petition for naturalization of his wife, Magdalena Retsagi Berenyi (R. 2). Both petitioners testified in support of their own respective peti-

tions and the petitions of each other. In addition, five other witnesses testified in support of the petitions for naturalization. The government produced two witnesses in opposition thereto.

Inasmuch as the testimony elicited was the vital determinative factor upon which the District Court's findings of fact and conclusions of law were based, it is necessary to briefly summarize same herein.

1. Testimony in Support of Petition

The petitioner testified he was born in Hungary on August 27, 1928. He was baptized in the Roman Catholic faith, was given a strict religious upbringing by his parents and as late as 1947 at the age of 18 or 19 was still an altar boy in an order of Franciscan nuns. He is presently a practicing Catholic (R. 87), and has never been politically active at all (R. 99, 100).

In September of 1946, he was admitted to the University of Budapest Medical School (R. 89). At that time the school was not under complete Communist control, but the Communists were in the government and there were Communist groups and organizations therein (R. 89).

In 1949, while a medical student, he joined the Hungarian army which thereafter provided for his tuition in medical school (R. 96). This was the only way in which he could complete his education inasmuch as his parents were poor people and could not provide his expenses throughout (R. 96, 97). It was not necessary to be a member of the Communist party to be in the armed forces and a great many non-Communists were similarly in the army (R. 96). This fact was confirmed by the government witness Kury (R. 66).

While a medical student and also a member of the army, he was approached by members of the party and urged to join (R. 92). However, petitioner never joined the party nor did he ever attend any closed meetings of the Communist party (R. 90-93). He attended open meetings to which he was invited and at which other non-Communist, were present, wherein the Communists attempted to indoctrinate the students in Communist ideology (R. 93, 94). Such invitations were tantamount to an order and his attendance thereat was under fear of serious adverse consequences if he failed to do so (R. 94). This too was confirmed by the testimony of the government witness Halasz who also stated that the petitioner was an outstanding student with respect to whom the Communists would have made every effort to recruit him into the party (R. 23-25, 30).

At about the time of his graduation in 1952, the petitioner married Magdalena Retsagi (R. 98) a classmate at medical school whom he had met in 1948 (R. 89). They were married in a religious ceremony though such rites were officially frowned upon (R. 98).

Following graduation, the petitioner served as an officer in the medical corp of the army and was stationed as a medical officer at various locations (R. 97). In 1956, he was promoted to Captain (R. 97).

During the Hungarian uprising in October and November of 1956, the division in which the petitioner was serving fought the Russians, and petitioner was on duty treating people who were wounded in the fighting (R. 107, 108).

After the uprising was crushed, the petitioner sought to escape from Hungary at the risk of being caught as a deserter. He prevailed upon his commanding officer to

furnish him with a document which would indicate that he was released from active duty. He realized that if he were stopped and examined such document would probably be of no avail, but he took the risk (R. 100-102). The original document was introduced in evidence as petitioner's Exhibit "A" and the translation thereof as Exhibit "B" (R. 271). On November 19, 1956, petitioner, his wife and her aunt and uncle left Budapest and set out for the Austro-Hungarian border (R. 101-120). He and his wife took only their medical credentials and a change of clothes with them, leaving all of their furniture and personal possessions behind (R. 102). Their escape from Hungary was vividly described in testimony by the petitioner, his wife and her aunt, Gertrude Farkas.

The petitioner and his wife spent several days in Austria and were thereafter flown to the United States where they were admitted for permanent residence on December 4, 1956 (R. 102, 103).

Following his arrival in this country, the petitioner immediately resumed his medical career at various hospitals in New York and New Jersey, fulfilling his internship and residency requirements thereat (R. 103, 104). On July 1, 1959, petitioner and his wife moved to Massachusetts where they have resided since (R. 104). He has taken and passed his medical state board examinations in Massachusetts, Illinois and Virginia (R. 104). He passed his specialty board examination in anesthesiology in April of 1964 and is a board certified diplomate in anesthesiology (R. 105). He has been and is presently associated with various hospitals in Massachusetts and has been a senior instructor on the staff of Tufts Medical School (R. 104, 105).

The petitioner testified without reservation or hesitation to his opposition to Communism, his loyalty and attachment to the United States and the Constitution and his willingness to fight and bear arms on behalf of this country (R. 106, 107).

He categorically denied ever having made the statement attributed to him by Kury or that he was a political leader in any student study group or other group of any kind (R. 95, 106).

The petitioner's wife, Dr. Magdalena Retsagi Berenyi, testified in support of her own petition for naturalization which was heard jointly with that of the petitioner and which was granted. She came from a well-to-do family whose business and property had been confiscated by the Communist government (R. 114, 115). Indeed her mother, father and two younger sisters had left Hungary in 1948 and came to the United States to escape the Communist regime (R. 112). They were permitted to leave because her father was a Czech citizen and travelled on a Czechoslovakian passport and his wife and children under eighteen were permitted to accompany him (R. 113, 118). Magdalena Berenyi also applied for an exit permit but was refused because she was over eighteen years of age (R. 113). She described the hatred which both she and her husband had for Communism and the Communist government of Hungary and their constant desire to leave the country and achieve freedom (R. 114, 120).

A further witness for the petitioner was Lorand De Bickish, a former Hungarian national who was a naturalized citizen of the United States and was a project engineer residing in Newton, Massachusetts (R. 130, 139). Mr. De

Bickish was an avowed anti-communist who had been arrested twice (R. 133, 134) and imprisoned on one occasion for six months for attempting to escape from Hungary in 1948. Also, his brother was a broadcaster for Radio Free-Europe in Munich and in 1955 he was exiled for four months to a small town in eastern Hungary because he maintained contact with his said brother (R. 135). During that exile, the petitioner and his wife were the only persons who visited him (R. 135). They also were the godparents of his child (R. 136). He first met the petitioner in 1950, having previously been a friend of petitioner's wife (R. 136, 137). He described how he and the petitioner often discussed politics and the petitioner always voiced views opposing Communism and the Hungarian government (R. 137, 138). They used to listen clandestinely to Radio Free Europe, the Voice of America and B. B. C. together, which was forbidden by the government (R. 137). On many occasions they talked together of leaving Hungary and escaping to freedom (R. 138).

Another witness for the petitioner was Dr. Ilona Raditz Ring, resident pathologist at Temple University, who was also a former Hungarian national and had become a naturalized United States citizen (R. 77, 84). She was formerly a student at the University of Budapest Medical School, having been two years senior therein to the petitioner and his wife, and having graduated therefrom in 1950 (R. 78, 79). Following her graduation, she had been a faculty member at the medical school (R. 83). She testified that from about 1949 or 1950 on, she saw petitioner about once a month and had occasion to discuss with him the political problems of the country (R. 79, 80). The peti-

tioner often expressed his opposition to Communism to her and his desire to leave Hungary and go to a free country (R. 81-83). In the United States, petitioner had often expressed his happiness and gratitude at being here (R. 84, 85).

Mrs. Charlotte Ray, the mother-in-law of petitioner testified that she had left Hungary in 1948 together with her husband and two younger daughters and had become a naturalized United States citizen in 1954 (R. 143). Her husband had a large textile manufacturing business which had been nationalized by the Hungarian government without compensation. She had every reason to be and was bitterly opposed to Communism (R. 144, 145). She first met the petitioner in December of 1956 when he came to this country as her oldest daughter's husband (R. 146). Since that time, the petitioner had on many occasions in her presence expressed his hatred for Communism and his love for this country and the freedom which it offered (R. 147).

Paulette Farkas, a naturalized United States citizen, who was the aunt of Magdalena Berenyi, testified that she had lived in the same apartment in Budapest with the petitioner and his wife following their marriage in 1952 until they left the country in 1956 (R. 148, 149). She and her husband escaped into Austria together with the petitioner and his wife (R. 149). She knew the petitioner since 1950, and between that time and their exit from the country, she had on numerous occasions discussed the political conditions that existed. Petitioner always expressed his opposition to Communism and his desire for freedom (R. 149, 150).

The testimony of the last witness for the petitioner, Harry Flam, a brother-in-law, was stipulated to between counsel to the effect that he would testify that petitioner was of good moral character, opposed to Communism and attached to the principles of the constitution (R. 151).

2. The Adverse Testimony

The government produced two witnesses whose testimony was offered in opposition to the petition. The first government witness was Dr. Pal Halasz, a physician and surgeon, who resided in Peoria, Illinois. He had attended the University of Budapest Medical School between 1949 and 1955 and knew the petitioner therefrom (R. 12-13). The witness had himself been a member of the Communist party between 1948 and 1956 (R. 17, 18). While he was at the university, Communist party meetings were held about once a month, but he did not attend all of them (R. 18, 19). He testified that he saw the petitioner at some meetings in 1950 or 1951, and when asked to be specific, he stated at perhaps two or three meetings and indeed was not even certain it was more than one (R. 20, 31). He had no specific memory of what occurred at any meeting which petitioner attended (R. 32). He did not recall whether these meetings were open or closed (R. 32). Most of the time the Communists invited the attendance of students whom they wished to indoctrinate (R. 37). These visitors would not be identified as non-members (R. 37). When a person was invited to attend it was a must that he do so or risk dire consequences (R. 23-25). The petitioner was an outstanding student and the Communists would naturally have sought to recruit him (R. 30). He had never seen a party membership card of the petitioner though he had on occasions been the doorkeeper at meetings (R. 27, 31), nor had

he ever seen petitioner's name listed in any party records (R. 31), nor did he recall the petitioner ever speaking or voting at such meetings (R. 26, 27, 32). Indeed, Halasz testified that he did not know whether petitioner was or was not a member, but merely assumed that he was because he saw him at meetings (R. 35). He knew, in fact, that petitioner was actually opposed to Communism and had heard him speak against the Communist party and the regime (R. 34, 35).

The second government witness was Dr. Gyorgy Kury, a physician residing in Brookline, Massachusetts (R. 38). He had attended medical school at the University of Budapest commencing in the same class with petitioner in 1946, but during the first two years had no contact with him (R. 39, 44, 45, 46, 47). In September of 1948, he was assigned to a small study group of about twenty students which met every afternoon (R. 52, 53). The purpose for these groups was the study of medical subjects and also political orientation (R. 48, 53). The witness attended only one meeting of a group wherein the petitioner was also a member before transferring to another group (R. 56). At this meeting in September of 1948, while the members told each other something of their respective backgrounds, the witness stated that he heard the petitioner tell the group that he was a member of the Communist party since 1945, following the Soviet occupation of the country, and that he was to be their instructor in Marxism-Leninism and was responsible for their ideological education (R. 42, 54). Petitioner also was said to have told the group to read Soviet books, see Soviet movies and discuss the news (R. 43, 54). Petitioner spoke for about five minutes on that occasion (R. 54). Dr. Kury never attended a meeting of this study group again,

having thereafter transferred to another group (R. 56). He did not remember the exact words used by petitioner on this occasion and did not remember the names of any other persons in the group (R. 54, 55). He had made no notes of this event (R. 53). Except for this one occasion he had never heard petitioner state that he was or had been a Communist (R. 56) and he had no close contact with the petitioner thereafter (R. 62-64).

In addition to the foregoing testimony certain documentary exhibits were entered into evidence which consisted mainly of the transcripts of prior testimony by the petitioner and the government witnesses taken before the Immigration and Naturalization Service. The testimony contained therein was in the main substantially the same as the trial testimony and added nothing of a consequential nature thereto.

C. District Court's Findings of Fact and Conclusions of Law

Based upon the above evidence, the District Court made certain specific findings of fact which were contained in its opinion dated March 29, 1965, which, although not separately numbered, were, insofar as herein pertinent, as follows:

1. That the petitioner became a member of the Communist party in Hungary in 1945.

2. That the petitioner remained a member of the Communist party for an indefinite number of years.

3. That the petitioner attended closed meetings of the Communist party.

4. That the petitioner was in charge of instruction in communist ideology and student study group meetings for an undetermined period of time.

Based upon the findings of these subordinate facts, the District Court found as ultimate facts that the petitioner knowingly testified falsely before the Immigration and Naturalization service on three occasions within the statutory period required for good moral character when he denied membership in the Communist party and was, therefore, not a person of good moral character within the meaning of the Immigration and Nationality Act.

As its conclusion of law, the District Court held that on the basis of the facts which it found, as hereinabove set forth, the petitioner had failed to establish that during the required statutory period he had been and still was a person of good moral character within the meaning of the Immigration and Nationality Act (R. 271-277).

D. Opinion of the Court of Appeals

The Court of Appeals affirmed the order of the District Court on the ground that the petitioner had failed to sustain his burden of proving that he possessed the statutory qualifications for naturalization, and more specifically the qualification of good moral character during the required statutory period. While the Court of Appeals conceded that the petitioner had made out a prima facie case of good moral character, it held that the District Court's belief of the adverse testimony satisfied the government's burden of going forward following the presentation of the prima facie case, and that the said Court was therefore justified in holding that the petitioner had failed to sustain his over-

all burden of proof. It concluded that in according due weight to the opportunity of the trial judge to observe the conduct and demeanor of the witnesses, it could not as a matter of law find the conclusion of the District Court to have been clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure (R. 303-308).

Summary of Argument

I

The District Court's finding that petitioner had been a member of the Communist Party was based solely upon an alleged extrajudicial oral admission which had been reputedly made more than sixteen years prior to the final hearing. The alleged statement did not take place at a Communist Party meeting or function. It was completely uncorroborated. There was no objective evidence of Party membership whatsoever. Other than the witness' testimony as to this one conversation of approximately five minutes duration, there was no other evidence upon which the District Court could have based such finding. The petitioner categorically denied that such conversation ever took place and offered numerous witnesses who testified unqualifiedly to his pronounced anti-Communist views throughout the years and who stated that to their knowledge he had never been a Communist. A second government witness testified that he had seen the petitioner at perhaps one, two or three Communist meetings but did not recall whether these meetings were open or closed. He stated that non-Communists at the medical school were often invited to attend such meetings and that an invitation was tantamount to an order, which if disobeyed, would result in dire consequences. This govern-

ment witness stated that in fact he knew the petitioner's views to be decidedly anti-Communist.

The District Court's finding of Communist Party membership was not based upon substantial evidence and was clearly erroneous. It chose to believe one minor portion of the evidence, which was of the weakest and least satisfactory nature, and ignored the overwhelming preponderance of credible evidence to the contrary. On the entire record, the District Court's finding did not reflect the truth or right of the case and evoked the firm conviction that a mistake was committed. *United States* v. *United States Gypsum Co., et al.*, 333 U.S. 364, 395.

II

Even assuming, arguendo, that some degree of membership had been shown, the evidence was insufficient to support a finding of Communist Party membership as to warrant a denial of naturalization.

The "meaningful association" test enunciated by this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469, should be extended to naturalization proceedings. This Court has indicated that such test should be applied in all situations where a finding of membership would subject a person to severe penalties. A denial of naturalization, in the case at bar, is such a situation.

Further, this Court has already applied the "meaningful association" test in construing the meaning of "member" as used in the Immigration and Nationality Act of 1952, with respect to its deportation provisions. *Gastelum-Quinones* v. *Kennedy, supra.* The petitioner has applied for

naturalization under the same Act. It must be assumed that Congress intended "member" to have the same meaning when used in two almost identically worded provisions of the same statute.

ARGUMENT

I. The Court of Appeals erred in upholding the District Court's findings that petitioner was a member of the Communist Party in Hungary and had therefore testified falsely in denying membership.

A. The said finding of Communist Party membership was not supported by substantial evidence and was clearly erroneous.

It is apparent that in making the aforementioned findings of fact and the resultant conclusion, the District Court did so solely on the basis of the testimony of the witness Kury.

Kury's testimony, in turn, is founded solely upon an alleged oral admission purportedly made by the petitioner on a single occasion of five minutes duration more than sixteen years prior to the final hearing herein.

There is absolutely no corroboration of Kury's testimony in this regard whatsoever. There is similarly no other testimony or evidence at all which in any respect would tend to prove petitioner's membership in the Communist party or participation in activities in furtherance of the Communist cause.

It is the petitioner's contention that the testimony of Kury, standing alone, is palpably inadequate as a proper

basis for the court's findings. Wigmore recognizes the weakness inherent in such testimony and comments thereon as follows:

> " . . . (5) There is no fixed rule that in civil cases generally an opponent's extrajudicial admission is insufficient, without other evidence, as the foundation of a verdict for one or more facts. But when the admission concerns the main controverted fact in the case, and the opponent's admission is the only evidence offered, a few Courts show an inclination to follow a general maxim that it is insufficient—at least when the admission is one of conduct only." *Wigmore on Evidence,* Third Edition, Volume IV § 1055.
>
> "Weight of Admissions. Except in the foregoing instances there are no specific rules which place a handicap on the use of a party's admissions. But there is a general distrust of testimony reporting any extrajudicial oral statements alleged to have been made, including a party's admissions," *Wigmore on Evidence,* Third Edition, Volume IV § 1056.

The weakness of such testimony is obvious. It is subject to every human frailty and failing imaginable. To remember and narrate accurately the statements of another after a lapse of sixteen years is, at best, most difficult. The narrator may be thoroughly honest in his belief that he has given the exact substance of the alleged admission and yet be mistaken. An unintentional transposition of a word or words in the narration, may give a meaning to it which is completely different from that which was intended. A listener is liable to misunderstand or to forget (particularly after sixteen years) what was really said or intended by the person making the statement, or to relate it incorrectly. A single word, misunderstood or not heard, or even a look

or a gesture, may produce upon the witness' mind a meaning totally different from that which the declarant intended to convey. Indeed, the declarant himself, may through inarticulateness or any other shortcoming of his own, not have expressed his true meaning. See *Gangi* v. *Fradus*, 227 N.Y. 452; *Flora* v. *Anderson*, 75 F. 217; *Langston* v. *Currie*, 95 Mont. 57.

Indeed, such testimony, standing alone, is legally insufficient to support a verdict in several types of actions including criminal cases and divorce actions.

Of course, the insidious effect of such testimony lies in the fact that it can never be conclusively countered or disproved. It can only be denied, which petitioner has done herein consistently and without qualification. In effect, it places the petitioner in the position of having to prove a negative proposition which is extremely difficult, if not impossible.

However, there is a statutory right in an alien to submit a petition for naturalization and evidence to a Court, to have the tribunal pass upon same, and if the requisite facts are established to receive his certificate of naturalization. In passing upon the application, the Court exercises a judicial judgment, it does not confer or withhold a favor. *Tutun* v. *United States*, 270 U.S. 568, 576; *Stasiukevich* v. *Nicolls*, 168 F. 2nd 474.

While the burden of proving the required elements for naturalization rests upon the petitioner, he makes out his prima facie case by his sworn petition and the affidavits of his witnesses. *Krausse* v. *United States*, 194 F. 2nd 440.

In the case of *Klig* v. *United States,* 296 F. 2nd 343 the Court reversed an order of the District Court which had denied naturalization on the ground that petitioner had testified falsely concerning his Communist party activities twenty to twenty-five years earlier, and, thus, was not a person of good moral character. The petitioner therein had testified that he had terminated his connections with the Communist party of Canada in 1932. Two government witnesses testified to his presence at four Communist party functions, including closed meetings of the party, between 1932 and 1938. Though Klig denied such allegations, the District Court chose to believe the government's testimony and made its findings as above set forth.

In reversing and remanding for a new hearing, the Court of Appeals stated as follows on page 346:

> "But in the context of this case whether appellant was present at the communist party functions between 1934 and 1938 which the District Court found he had attended, is too insignificant to furnish an adequate basis for it to have found that petitioner intended to testify falsely to obtain a benefit under the Act. Without more, these misstatements, if misstatements they were, concerning these olden affairs do not evince a lack of good moral character required by the statute."

In *Stasiukevich* v. *Nicolls, supra,* one Apelman, an immigration inspector, testified that he had made an investigation of the petitioner and had spoken with fifteen or twenty persons in his home community. In response to a question put to him on direct examination as to petitioner's reputation in the community, Apelman answered, "His reputation in the community is of being a Communist."

In reversing the District Court's denial of the petition, the Court stated as follows at 168 F. 2nd 479:

> "A finding that Stasiukevich was a communist would have clearly been erroneous on this record. Membership in the communist party cannot be proved by Apelman's testimony concerning what he was told by fifteen or twenty persons in Maynard to the effect that Stasiukevich's reputation was that of being a communist."

In the case of *In re Sittler's Petition,* 197 F. Supp. 278, affirmed *Sittler* v. *United States,* 316 F. 2nd 312, the issue was one of attachment to the principles of the constitution. The petitioner had been a commentator for the nazi government during the second world war. Four witnesses testified for the government before the designated naturalization Examiner. A newspaper reporter testified that petitioner had stated in an interview that he could not condemn Hitler. Three other witnesses testified that at various times in 1948 petitioner had made anti-American, anti-Semitic and pro-German remarks. While the District Court denied naturalization based upon other evidence, it made the following comments with respect to the sufficiency of the testimony of the witnesses hereinabove mentioned, at page 280:

> ". . . but the content of the testimony of four government witnesses respecting the post war period is too fragmentary, indefinite and remote to stand alone as a sufficient basis for denying the petition."

It is respectfully submitted that the testimony of a single witness as to the one extrajudicial statement purportedly made more than sixteen years ago, standing alone, is equally insufficient to justify the Court's findings in the

case at bar. This is particularly so in view of the petitioner's vehement denials thereof and the overwhelming corroboration of his anti-Communism offered by his witnesses and the government witness Halasz.

Indeed, all that the petitioner could possibly do to counter the testimony of Kury was to present to the Court through such witnesses as were available, a complete and candid picture of his background and history. Such testimony and the facts elicited therein place grave doubts upon the accuracy of Kury's allegation. The entire tenor of the petitioner's personal life and associations militate against the inferences to be drawn from Kury's testimony. The petitioner's religious training, upbringing and observance to the present time are completely inconsistent with his ever having been a member of the Communist party. Indeed, in the year 1945 when petitioner is found by the Court to have joined the Communist party, he was a sixteen year old high school student who had no political involvement at all (R. 88). The testimony of the witness De Bickish, an avowed anti-Communist who suffered imprisonment and exile at the hands of the Hungarian regime, strongly supports the petitioner's testimony. The petitioner's participation in a religious marriage ceremony, and, indeed, his marriage to a wife whose family had been deprived of its livelihood by the Communists, is a further strong indication of the fact that he was not a Communist. Indeed, the wife's family who testified for the petitioner at the final hearing did and had every reason to detest Communism and Communists.

But perhaps the strongest testimony in the petitioner's favor was that which was given by the government's other witness, Halasz. Here was a man who was himself an ad-

mitted Communist and who knew the petitioner much more closely than did Kury. Halasz, however, could not truthfully state that the petitioner had ever been a member of the Communist party. The one, two or three meetings at which he saw petitioner in attendance, could very well have been open meetings to which petitioner had been invited and which, under the circumstances then existing in Hungary, he was compelled to attend. Indeed, Halasz stated that he knew the petitioner's actual views to be extremely anti-Communist.

Added to all of the factors is the complete absence of any objective evidence to prove the petitioner's membership in the Communist party. There was no testimony that he ever held a membership card therein, paid any party dues, voted at any party meetings, participated in any party discussions, nor was his name ever seen in any party records. Under all these circumstances, it is inconceivable that the District Court could have found that the petitioner was actually a member of the Communist party.

Indeed, even if the testimony of Kury were to be believed as against the weight of all of the other evidence, Kury's testimony would only prove that the petitioner made the statement attributed to him by the said witness. It would certainly, in no way, prove the truth of the content of the said statement. Further the meeting at which Kury claimed such statement to have been made was never even alleged to have been a Communist party meeting.

It is thus respectfully submitted that the District Court's finding that petitioner was a member of the Communist Party is totally lacking in the support of any substantial evidence.

Substantial evidence is more than a mere scintilla; it means such evidence as a reasonable mind might accept as adequate to support a conclusion. Uncorroborated hearsay or rumor do not constitute substantial evidence. *Consolidated Edison Co., et al.* v. *National Labor Relations Board, et al.*, 305 U.S. 197, 229; *United States* v. *Krumsiek*, 111 F. 2d 74.

Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985; *Sawkow* v. *Immigration and Naturalization Service*, 314 F. 2d 34.

In determining what constitutes substantial evidence, the court must consider the entire record. Substantial evidence means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of the fact to give it the credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord. *Gooding* v. *Willard*, 209 F. 2d 913.

Considered in the context of the entire record herein, the government's evidence against the petitioner consisted of a single fragmentary, isolated, uncorroborated and remote instance of a purported admission that is completely inconsistent with the preponderance of evidence to the con-

trary. As an alleged extrajudicial statement standing alone, with respect to the main controverted fact in issue, it is the weakest possible type of evidence. Significantly, the District Court's opinion contained no findings which in any way questioned the credibility of the petitioner's witnesses. Indeed, it was on the basis of the very testimony of these same witnesses that the District Court granted naturalization to the petitioner's wife.

As an example of the nature and quantum of evidence which has been held insufficient to prove membership in the Communist Party, see *United States* v. *Bridges,* 133 F. Supp. 638. By comparison the government's evidence in the case at bar is infinitesimal.

It has been repeatedly held that an appellate court should reverse the findings of the district court where (1) the findings are without substantial evidence to support them; (2) the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case. *Sanders* v. *Leach,* 158 F. 2d 486; *United States* v. *Kaplan,* 277 F. 2d 405; *Simpson* v. *United States,* 322 F. 2d 688.

The District Court's findings in the case at bar would appear to fall squarely within the said rule. It should further be noted that some of the Court's subsidiary findings are literally unsupported by any evidence at all. The finding that petitioner attended closed meetings of the Communist Party is without any evidentiary support. Kury's testimony did not pertain to petitioner's attend-

ance at any Communist Party meetings, open or closed. Halasz definitely stated that he could not recall whether any meeting at which he saw petitioner was open or closed.

Similarly, the Court's finding that petitioner did not participate in the Hungarian uprising is not only without any evidentiary basis, but is directly contrary to the only testimony pertaining thereto. The petitioner, whose testimony in this respect was uncontroverted, stated that his division fought the Russians during the revolt and that he remained on duty as a medical officer treating the injured throughout. As a doctor and a medical officer he thus performed his duties in the capacity for which he was trained and in which he was skilled. The Court's finding of nonparticipation would thus appear to be completely baseless.

In addition, the Court's characterization of the length of petitioner's alleged membership in the Communist Party "for an indefinite number of years" and his alleged instructor status in Communist ideology "for an undetermined period of time" are equally without evidentiary support at all and indicative of the gossamer quality of the findings.

Of course, the application of the term "finding" to the District Court's ultimate conclusion of lack of good moral character, as set forth in the opinion, does not alter the fact that the said determination embodies a conclusion of law, nor alter the duty of the reviewing court to reach its own decision thereon and to reverse if it deems that conclusion erroneous. *Baumgartner* v. *United States,* 322 U.S. 665; *Lehman* v. *Acheson,* 206 F. 2d 592.

A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co., et al.,* 333 U.S. 364, 395. See also *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474.

Under the prevailing principles and authorities above cited, it is respectfully submitted that the District Court's finding of Communist Party membership was not based upon substantial evidence and, as such, was clearly erroneous. Similarly the Court of Appeals erred in upholding the said finding.

II. The Court of Appeals erred in upholding the District Court's finding of Communist Party membership in the complete absence of any evidence showing a "meaningful association" or indeed any degree of commitment to or involvement with the Party.

This Court has recognized a great practical and legal difference between those persons who knowingly join the Communist Party aware of its aims and purposes and those whose membership therein is intrinsically innocent or nominal. In furtherance of the recognition of this distinction, the Court has, under various circumstances, refused to inflict serious penalties upon such persons whose "membership" has not been shown to be of such a degree or nature as to amount to a "meaningful association" with the Party. *Rowoldt* v. *Perfetto,* 355 U.S. 115; *Gastelum-Quinones* v. *Kennedy,* 374 U.S. 469; *Niukkanen* v. *McAlexander,* 362 U.S. 390; *Scales* v. *United States,* 367 U.S. 203, 222.

It is recognized that the District Court's conclusion that the petitioner failed to establish good moral character was

technically based upon the finding that he had falsely denied membership in the Party and that, in this context, the nature or degree of his commitment may be said to be immaterial. However, as such finding of false testimony could not have been made without the underlying primary finding that petitioner had previously become a member of the Communist Party, it is this latter determination of fact which, in effect, inevitably dictated the denial of naturalization. It is thus the finding of such membership which is the very core of this case.

The opinion of the Court of Appeals in this case conceded that the petitioner had made out a prima facie case for naturalization upon the final hearing in the District Court and that the burden of going forward with countervailing evidence thereupon shifted to the government. *Berenyi* v. *District Director*, 352 F. 2d 71, 73. Having thus recognized the government's evidentiary burden, however, it would appear that the court below completely failed to apply any of the criteria enunciated in the above cited decisions of this Court to the evidence which the government did introduce with respect to the petitioner's Communist Party membership. Instead, the court merely stated that the trial court's "belief of the evidence that the petitioner had been a Communist adequately satisfied that burden." In view of the de minimus nature of the evidence of such membership which was adduced, it would appear that the Court of Appeals completely failed to consider the nature and quality of such evidence. Certainly, a comparison of the nature and quality of the membership evidence in the case at bar, with the evidence which existed in *Rowoldt*, *Gastelum-Quinones* or *Galvan* v. *Press*, 347 U.S. 522, leads inescapably to this conclusion. It is respectfully submitted

that the failure to apply the standards required under the above cited cases to evidence of Party membership in the case at bar constituted error.

It is further submitted that this Court's decisions in *Galvan, Rowoldt, Gastelum-Quinones* and *Niukkanen,* as well as the tenor of its pronouncements in other cases involving the meaning of the word "member" in a statute, have, in effect, indicated a minimal substantive standard for a finding of Communist Party membership in all situations wherein a person is subject to serious penalties upon a finding of such membership, regardless of the nature of the proceeding or the burden of proof involved therein. See dissenting opinion of Mr. Justice Douglas in *Killian* v. *United States,* 368 U.S. 231, 266, 267.

The denial of citizenship to an alien who, like petitioner, has fled the totalitarian regime of his native land and who now has no home or ties other than in the United States, is a grave and serious matter. Not only does it prevent the alien from joining fully in the affairs of his adopted land, but it also denies him the security which a citizen possesses against the possibility of the drastic measure of deportation, which can be the equivalent of banishment or exile. *Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10; *Delgadillo* v. *Carmichael,* 332 U.S. 388, 391.

Moreover, this Court has already had the occasion to construe the meaning of the word "member" as used in the deportation provisions of the Immigration and Nationality Act of 1952, the very statute under which the petitioner seeks naturalization in the case at bar. In *Gastelum-Quinones* v. *Kennedy, supra,* this Court extended the "meaningful association" doctrine to a finding of Commu-

nist Party membership under section 241(a)(6)(C) of the Act wherein such membership was made a ground for deportation. The language of section 241(a)(6)(C) is substantially identical to that of section 313(a)(2) of the Act which makes such membership a bar to naturalization. It would certainly not be logical to assume that Congress meant the same word ("member") to have different meanings when used in two almost identically worded sections of the same statute.[1] It is thus submitted that a finding of membership in the Communist Party as a bar to naturalization, must be based on evidence of "meaningful association", just as evidence of such association must be present to warrant the issuance of a deportation order. It is clear that no evidence of such an association existed in the case at bar.

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[1] The dissenting opinion in *Rowoldt* disputed the majority's reliance therein, upon the holding in *Galvan* that Congress, in 1951, by enacting an ameliotory amendment to the Internal Security Act of 1950, intended a benign construction upon the use of the word "member" in the said Act. The dissent pointed out that the legislative concern in enacting the amendment appeared to be solely with exclusion situations rather than with the deportation. It found support for this contention in the fact that when the Immigration and Nationality Act of 1952 repealed the 1951 amendment, its substance was reenacted with respect to exclusion but not with respect to deportation. 355 U.S. 115, 124, footnote.

It should be noted, however, that the substance of the said 1951 amendment was also enacted in the naturalization provisions of the Immigration and Nationality Act of 1952, as section 313(d) of the said Act.

CONCLUSION

The judgments below should be reversed with directions to enter judgment granting the petitioner's application for naturalization.

Respectfully submitted,

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